SEPARATE OPINION OF JUDGE GAJA

Decolonization of a non-self-governing territory — Principle of territorial integrity — Role of the General Assembly in determining how decolonization should be effected — Principle of self-determination.

1. While I concur with the Court's negative answer to the first question addressed by the General Assembly, whether the "process of decolonization of Mauritius [had been] lawfully completed" in 1968, I do not find it necessary to base this conclusion on the status at that time of the rule concerning self-determination with regard to non-self-governing territories. In the context of decolonization, the principle of territorial integrity, as expressed in paragraph 6 of General Assembly resolution 1514 (XV), implies that the whole colonial territory needs to be considered, although, contrary to the view expressed in paragraph 160 of the Advisory Opinion, it does not necessarily require that the whole territory be attributed to one and the same newly independent State. Since the Chagos Archipelago was administered until November 1965 as a dependency of Mauritius, the decolonization of the colonial territory relating to Mauritius had to include the Archipelago. Under Article 73 of the Charter of the United Nations, an administering Power of a non-self-governing territory had to promote the well-being of the inhabitants and their self-government. Establishing a new colony (the British Indian Ocean Territory) in order to construct a military base on the Archipelago and expelling the indigenous population were not steps in that direction and could not be regarded as a form of decolonization consistent with the obligations flowing from the Charter.

2. The will of the peoples belonging to the non-self-governing territory did not play any significant role in the process that led to the separation of the Archipelago from Mauritius. The Chagossians were never consulted or even represented. The people of Mauritius were never given an opportunity to express their views on the separation of the Archipelago or on any issue relating to its future status. The Council of Ministers of Mauritius was involved in some negotiations in the autumn of 1965, about two years before Mauritius reached independence, but had little choice in the matter. Its position hardly affected the administering Power's decision to separate the Archipelago from the rest of the territory of the colony, which was effected by an Order in Council of 8 November 1965. As was later observed in a memorandum by a Foreign Office official, the consent of the representatives of Mauritius to the separation "was sought for essentially political reasons" (Written Statement of Mau-

ritius, Ann. 124). These pursued the objective of mitigating criticism for establishing a new colony as late as 1965, moreover with the aim of building a military base. In any event, the representatives of Mauritius never accepted a definitive separation of the Archipelago, given that in September 1965 the administering Power had agreed at the constitutional conference at Lancaster House that "if the need for the facilities on the islands disappeared the islands should be returned to Mauritius" and that "the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government"; also the existence of "fishing rights" of Mauritius was mentioned (Written Statement of the United Kingdom, Ann. 33).

3. The General Assembly did not specifically ask the Court to state whether the decolonization of Mauritius is still incomplete. This request may however be considered implicit in the second question, which refers to the "consequences under international law . . . arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago". Once the first question addressed to the Court by the General Assembly has been answered in the negative, the consequence must follow that the decolonization of Mauritius is still incomplete. It is uncontested that the separation of the Archipelago continues, that there is a large military base on Diego Garcia and that no programme for the resettlement in the Archipelago of the indigenous population has been implemented. All this indicates that, under the perspective of decolonization, nothing of significance has changed in the factual situation over the last fifty years. Moreover, the affirmation in international law of the right of peoples to self-determination has enhanced the obligation of the administering Power to decolonize.

4. When answering the second question the Court thus rightly stated that there continues to exist an obligation for the administering Power to decolonize the Chagos Archipelago. With regard to the ascertainment of that obligation, the fact that there has been a long-standing dispute between Mauritius and the United Kingdom over the Archipelago does not raise any issue of judicial propriety. Decolonization is a principle of international law from which *erga omnes* obligations flow, as the Court noted in its Advisory Opinion on the *Wall* with regard to "the obligation to respect the right . . . to self-determination" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004 (I)*, p. 199, para. 155). In so far as the Advisory Opinion addresses questions relating to the completion of the decolonization of Mauritius, the questions raised are also of concern to third States and to the international community. With regard to these issues, the Court should not decline to exercise its jurisdiction.

5. However, the General Assembly has not requested the Court to state how decolonization should be effected in relation to the Chagos Archipelago, thus completing the process of decolonization of Mau-

ritius. This is a task that the General Assembly may have wished to retain in full. Accordingly, in paragraphs 178 and 179, the Court should have left this determination entirely to the General Assembly, and not only the "modalities necessary for ensuring the completion of the decolonization of Mauritius".

6. In contemporary international law, decolonization implies the implementation of the principle of self-determination. As the Court noted in its Advisory Opinion on *Western Sahara*, "[t]he right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized" (*I.C.J. Reports 1975*, p. 36, para. 71). By referring in its two questions to three resolutions of the years 1965 to 1967 which stress the requirement of maintaining the integrity of what was the colonial territory, the General Assembly may have considered that, as the result of the process of decolonization, the Archipelago would become part of Mauritius. However, the General Assembly may revisit the issue and in particular take into account the will of the Chagossians who were expelled by the administering Power and of their descendants. The compensation that many of them received for their displacement does not make their will insignificant under the perspective of self-determination. What may weigh against their consultation is rather their limited number and their present dispersion.

7. As recalled above, the General Assembly's second question refers more generally to the "consequences under international law . . . arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago". In order to specify some of these consequences, it would be essential for the General Assembly to determine first how the process of decolonization should be completed. Moreover, certain consequences would depend on the attitude that the administering Power took if it were considered to be under an obligation to transfer the Archipelago to another State (presumably, Mauritius) in view of completing decolonization. In any event, the Court has preferred not to speculate about the conduct that the administering Power would take in such a case and the ensuing legal consequences that could arise for that Power and for other States. If the Court had chosen to express views on bilateral questions such as the alleged existence of an obligation for the United Kingdom to make reparation to Mauritius, an issue of judicial propriety would have arisen, given the lack of consent of the two States concerned regarding the submission of their dispute to the Court.

(*Signed*) Giorgio GAJA.